(1)

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1993

IN THE MATTER OF:

DONALD MARK GARRINGER

On Petition for Writ of Certiorari
to the Indiana Supreme Court

Petition for Writ of Certiorari

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66 pp

QUESTIONS PRESENTED

1. Does a lawyer have a constitutional freedom of utterance to report wrongdoing to authorities.

2. Does a lawyer have a constitutional due process right to cross-examine witnesses against him, call witnesses on his behalf, and submit evidence on his behalf, in lawyer discipline proceedings before he is deprived of his livelihood.

3. Can there be a finding of "reckless disregard of the truth" without a finding of falsity in lawyer discipline proceedings.

4. Since this petition conclusively demonstrates that Indiana is a kleptocracy where lawyers routinely steal property entrusted to their care, is the State of Indiana governed under the rule of law.

5. Can the public's constitutional right to be heard by counsel be limited to counsel who does not make scathing statements, and only says things pleasing to authorities.

6. Can all administrative and judicial remedies be exhausted to require a lawyer to account for property in his care, without an articulation why lawyers do not have to account for property entrusted to their care.

LIST OF PARTIES

APPELLEE:

Donald L. Lundberg, Exec. Secretary
Indiana Supreme Court
Disciplinary Commission
115 West Washington Street
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OPINIONS BELOW

The opinion of the Indiana Supreme Court is reported and published at 626 N.E.2d 809, a copy of which is reproduced in the Appendix hereto at pages 2 to 15 (hereafter, referenced as "App.___.").

JURISDICTION

The opinion of the Indiana Supreme Court was filed on January 10, 1994. A timely Application for Petition for Review was filed with a fifteen-page appendix of record that is reproduced as Appendix "B" hereto (hereafter referenced as "B.App.____"). The Application for Petition for Review tolls the time within which to file a Petition for Writ of Certitorari from the decision of January 10, 1994, pursuant to Rule 13.4 of this Court. The Application for Petition for Review was denied on March 15, 1994. App.1. The United States Supreme Court has jurisdiction to review the January 10, 1994 decision of the Indiana Supreme Court pursuant to 28 U.S.C., Section 1257.

RULES INVOLVED

First Amendment of the Constitution of the United States:

Congress shall make no law...abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.

Fourteenth Amendment of the Constitution of the United States, Section 1:

...nor shall any State deprive any person of life, liberty, or property, without due process of law;....

STATEMENT OF THE CASE

On December 30, 1985, George and Joyce Wade and the U.G. Wade Trucking, Inc., filed for bankruptcy in the U.S. Bankruptcy Court for the Southern District of Indiana. Attached to the bankruptcy petition of the U.G. Wade Trucking, Inc., was Schedule B-1 listing 20 accounts receivable of the trucking company. B.App. 1-2. Petitioner Donald Mark Garringer ("Garringer"), an Indianapolis attorney,

appeared as counsel for the debtors and had problems getting information concerning the collections of assets listed on Schedule B-1. App. 4 at footnote 1. First bankruptcy trustee Edward B. Hopper, accounted for three of the 20 items of property listed on Schedule B-1, and asserted a privilege to information concerning collection of the remaining seventeen items of property listed on Schedule B-1. B.App. 8-9.

In July, 1989, Garringer recieved documentary material concerning the collection of the item of property identified as "Hartwick" listed on Schedule B-1. B.App.3-5. This included a letter of counsel for first bankruptcy trustee Edward B. Hopper to Hartwick demanding the sum listed on Schedule B-1, and the response of "S.Castillo" of Hartwick at the bottom of the letter indicating payment to Indiana attorney Robert Sheaffer. B.App.3. Enclosed with the response of S.Castillo were checks payable in care of Robert Sheaffer for Wade Trucking and endorsed on the back "Wade

Trucking" after the filing of bankruptcy. B.App 4-5. There was nothing in the bankruptcy record as to what right or interest attorney Sheaffer had to the proceeds of the item of property identified as Hartwick on Schedule B-1, as bankruptcy trustee Neil E. Shook, successor to bankruptcy trustee Hopper, testified that there was absolutely no reason for attorney Sheaffer to account for the proceeds of the Hartwick account listed on Schedule B-1. B.App. 6-7.

Upon receipt of the documentary material concerning the collection of the item of property identified as Hartwick on Schedule B-1, Garringer wrote to the President of the United States (hereafter "the letter'). The letter reported that first bankruptcy trustee Hopper had filed a complaint against the Wades for bankruptcy fraud, perjury, mutilation and concealment of assets and records, without a fact articulated in support. It reported that Hopper directed a search of the Wade home without authority of any court. It reported

that Hopper appropriated the Wades' bank account without authority of any court or notice to the Wades. It reported that Hopper redirected the Wades' personal mail without the authority of any court or notice to the Wades.

The Wades filed a complaint against bankruptcy trustee Hopper as an Indiana attorney, attorney Robert Sheaffer and counsel for Merchants Bank, with the Disciplinary Commission of the Indiana Supreme Court alleging the theft and concealment of the items of property listed on Schedule B-1. The complaint articulated that the Wades, as principal officers of Wade Trucking, are left to pay the taxes on collections of Schedule B-1 accounts, and that these collections should pay the other taxes owed by Wade Trucking in the normal operation of law, but that the Wades are now paying. Donald Lundberg, Executive Director of the Disciplinary Commission of the Indiana Supreme Court and Respondent herein (hereafter, "Lundberg"),

responded that the allegations of theft and concealment of Schedule B-1 assets did not articulate allegations that constituted attorney misconduct.

In 1992, Lundberg filed a verified complaint with the Indiana Supreme Court against Garringer for writing to the President of the United States in 1989. Lundberg verified that Garringer made false statements to the President with the intention to disrupt tribunals and prejudice the administration of justice.

In discovery, Garringer served a single interrogatory to Lundberg asking Lundberg to identify what statements in Garringer's letter Lundberg believed to be false and his foundation for believing they were false. Lundberg moved for a protective order which was granted.

In connection with hearing in the matter, Garringer served a subpoena on Lundberg for testimony and documentary material concerning collections of Schedule B-1 accounts and what

right or interest attorney Sheaffer had to the proceeds of Hartwick listed on Schedule B-1. B.App.10. Lundberg responded with a motion to quash and motion for protective order wherein Lundberg admits that he has this information, however, it is privileged and confidential. B.App. 11-14.

Garringer served subpoenas for the person and documents identical to the Lundberg subpoena [B.App.10] on bankruptcy trustees Edward B. Hopper and Neil Shook, attorney Robert Sheaffer, and counsel for Merchants National Bank. Garringer served a subpoena identical to the Lundberg subpoena on the local Office of the U.S. Trustee attaching the portion of transcript where counsel for the U.S. Trustee testified that the Office of the U.S. Trustee did an audit of the assets listed in the Wade bankruptcy and knows where each asset went. B. App.15. Garringer served a subpoena on the local office of the Federal Bureau of Investigation ("the F.B.I.") as the F.B.I. investigated allegations of wrongdoing

in the Wade bankruptcy and traced the collections of items of property listed on Schedule B-1.

All prospective witnesses subpoenaed by Garringer filed motions to quash and motions for protective orders. The Hearing Officer in this matter struck portions of the Lundberg Verified Complaint alleging that Garringer made "false statements" to the President. See, App. 10-11. Thus, the truth of Garringer's statements to the President were immaterial and irrelevant, and the subpoenas were immaterial and irrelevant. Id. The Hearing Officer quashed all subpoenas issued by Garringer.

At hearing in this matter, Garringer was not availed the opportunity to cross-examine witnesses called by Lundberg. Garringer was not availed the opportunity to cross-examine Lundberg on his testimony by way of his verified complaint. Garringer was not availed the opportunity to cross-examine counsel for Merchants National Bank, whose telephone calls

and letters to the Disciplinary Commission initiated the disciplinary proceeding. Garringer was not availed the opportunity to call witnesses and subpoena documents which vindicated him, to wit, the persons and documents subpoenaed by Garringer.

REASONS WHY THIS PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED

This petition cites authority of this Court that there is a substantial First Amendment right of lawyers to articulate wrongdoing to the authorities, without fear of punishment, that has never been addressed by the Supreme Court. In absence of guidance, state courts are free to punish lawyers who report illegal activity and wrongdoing to authorities, and here, a state court has done so. This results in a "chilling effect" on lawyers, and grave injustices to members of the public, as shown herein.

This petition cites authority of this Court that lawyers have a fundamental liberty and property right to practice law in state courts

that cannot be deprived of them without due process of law, guaranteed by the Fourteenth Amendment. However, there has been no plain opinion by the Supreme Court that due process, in the discipline of lawyers by state courts, includes a right of a lawyer to cross-examine witnesses against him and a right to call witnesses on his behalf. In the absence of guidance by the Supreme Court, this petition demonstrates that the petitioner herein was deprived of an opportunity to cross-examine witnesses against him, an opportunity to call witnesses on his behalf, and opportunity to submit public record which vindicates him. This results in grave injustices to members of the public, as shown herein.

This petition cites authority of this Court that to make a judicial finding that statements made with "reckless disregard of the truth" requires a showing that statements were made departing from the truth. However there has been no opinion by this Court that this "reckless disregard" standard extends to

lawyers in disciplinary proceedings in state courts. In the absence of guidance, state courts are free, as here, to make a finding of statements made with reckless disregard of the truth without a showing that a departure from the truth was made.

This petition conclusively demonstrates that a "kleptocracy" exists in the State of Indiana where lawyers routinely steal property entrusted to them, and cites a report of the General Accounting Office that this is so. This results in grave injustices to members of the public who are deprived of property and their rights under the laws and Constitution of the United States. This petition cites ancient authority of this court that when a fiduciaries dealings are challenged, his dealings are subject to rigorous scrutiny. There is no opinion by this Court that makes clear that a lawyer is a fiduciary who is required to account for property in his care.

This petition conclusively demonstrates that the lower state court in this matter is

suffering from confusion, and does not understand the plain meaning of a schedule of assets entrusted to a lawyer's care, and the significance of endorsed checks reducing this property to money by a lawyer without any right or interest in the property evidenced in any public record. There has been no opinion by this Court on this, and a plain opinion by this Court will assist the lower state courts by eliminating confusion.

This petition conclusively demonstrates that the Respondent in this matter is unable to articulate an intelligible response to this Petition with authority in the Laws of the United States, and can only respond with broad adjectives asserting that this petition is "frivolous", etc. This petition demonstrates substantial departures from the laws of the United States, far departures from the usual and accepted course of proceedings, and important questions of gravity and general importance requiring the supervisory authority of this Court. This petition demonstrates that

grant of this petition will have great importance in eliminating far departures from the law and grave injustices done to members of the public, and serve to protect fundamental constitutional rights of millions.

I. THIS PETITION DEMONSTRATES AN IMPORTANT QUESTION CONCERNING THE CONSTITUTIONAL FREEDOM OF UTTERANCE BY A HALF-MILLION LAWYERS THAT HAS NEVER BEEN ADDRESSED BY THIS COURT.

"Of course, a lawyer is a person and he too has a constitutional freedom of utterance and may exercize it to castigate courts and their administration of justice." In Re: Sawyer, 360 U.S. 622, 666, 2 L.Ed.2d 1473, 1499, 79 S.Ct. 1376 [dissenting opinion of Frankfurter,J.,]. What was assumed by Justice Frankfurter, has never been addressed in a controlling opinion by this Court.

In the absence of a controlling opinion by this Court, the lower court has found that a report to authorities by a lawyer does not have to be "published" to a member of the public, notwithstanding the purpose of the disciplinary rule prohibiting such statements.

App. 8; See, Comment to Rule 8.2 of Indiana Rules of Professional Conduct at App. 13. "It is enough that the statements are publicized to another individual." App.8. In other words, reporting wrongdoing to a proper authority is punishable. Id.

Lawyers are in a unique position to observe wrongdoing and activity prejudicial to the administration of justice. The reported opinion by the lower court was intended to serve as a "chilling effect" on other lawyers, who, in good faith, report what they believe to be wrongdoing to the proper authorities. App.14. This discourages the basic duty of every lawyer to inform the authorities when wrongdoing is observed. This results in grave injustices to members of the public, and departures from the law, as shown herein. Infra.

II. THIS PETITION CONCLUSIVELY DEMONSTRATES THAT THERE IS AN IMPORTANT QUESTION AS TO WHETHER THE PROCEDURAL DUE PROCESS RIGHTS OF A LAWYER IN A LAWYER DISCIPLINARY PROCEEDING INCLUDES A RIGHT TO CROSS-EXAMINE WITNESSES, CALL WITNESSES, AND SUBMIT EVIDENCE, THAT HAS NEVER BEEN ADDRESED BY THIS COURT.

This Court has held that lawyers are entitled to procedural due process in state courts before discipline is imposed in attorney discipline proceedings, which includes fair notice of the charges. See, Re:Ruffalo, 390 U.S. 544, 550, 20 L.Ed.2d 117, 122, 88 S.Ct. 1222 (1968). However, this Court has not elaborated the necessary elements that constitute procedural due process in state proceedings. In the absence of guidance from this Court, Garringer was deprived of the opportunity to cross-examine witnesses against him and call witnesses on his behalf. Since Garringer was subpoenaing information concerning collections of assets listed on a bankruptcy schedule [B.App.10], Garringer was deprived of the opportunity to offer "public record," wherever located, that exculpated and vindicated him. In Re:Grand Jury Proceedings and In Re:Jim's Garage, 119 Bankruptcy Reporter 945 (E.D.Mich-1989).

In absence of guidance by this Court, the lower court found that Garringer's assertions

that not being availed the opportunity to cross-examine witnesses against him and not being availed the opportunity to call witnesses, were allegations of procedural deficiency "without merit." App. 11-12.

The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. Matthews -v- Eldridge, 424 U.S. 319, 47 L.Ed.2d 18, 96 S.Ct. 893 (1976). This includes the ancient and fundamental right of an accused to cross-examine witnesses against him and call witnesses on his behalf. Goldberg -v- Kelly, 397 U.S. 254, 25 L.Ed.2d 287, 90 S.Ct. 1011 (1969). A plain opinion by this Court extending these fundamental rights to lawyers in disciplinary proceedings will serve to protect all lawyers from summary and arbitrary deprivation of their livelihood. Also, it will insure integrity of the profession and the administration of justice, and ameliorate the grave injustices to members of the public as shown herein.

III. THERE IS AN IMPORTANT QUESTION AS TO FINDINGS MADE OF STATEMENTS MADE WITH "RECKLESS DISREGARD OF THE TRUTH" WITHOUT A FINDING OF FALSITY IN LAWYER DISCIPLINE AND THIS COURT HAS A DUTY TO EXAMINE THE RECORD.

This Court has held that findings cannot be made of statements made with "reckless disregard of the truth" without a finding of falsity. Garrison -v- Louisiana, 379 U.S. 64, 74, 13 L.Ed.2d 125, 85 S.Ct. 209 (1964). There has been no opinion by this Court whether this common sense extends to lawyer discipline.

This Court has a duty to examine the evidence to see whether it furnishes a rational basis for the characterization put on it by the lower court. Re: Sawyer, supra, 360 U.S. at 628. The lower court characterized Garringer's letter as "vague and unsubstantiated proclamations of wrongdoing without a a single specifity." App.9. However, the unaccounted-for collections of the Hartwick account on Schedule B-1 by checks #4320 and #4321 is a single specifity of wrongdoing. B.App. 3-5.

The lower court states that it "will not retry the Wade bankruptcy", as if to suggest that the allegations concerning the collection of the Hartwick account on Schedule B-1 were litigated in another forum. App.9. However, all we have for the record in any forum, is the testimony of successor bankruptcy trustee Neil Shook that there is "absolutely no reason" for attorney Sheaffer to account for the proceeds of the Hartwick account. B.App.7. This is a far departure from law. Rule 6002 of Bankruptcy Rules of Procedure. For the record, there is assertion of "privilege" to information concerning collections of Schedule B-1 accounts by bankruptcy trustee Edward B. Hopper, without any determination of the applicability of the privilege by any court. B.App.8-9. That is because this is another far departure from the law. In Re: Jim's Garage, supra. "Speculation cannot take over where proofs fail." Re: Sawyer, supra, 360 U.S. at 622.

There is no record anywhere that Garringer made a specific false statement in his letter. App. 2-15, passim. Lundberg, the Respondent herein, swore by verified complaint that Garringer made "false statements" to the President somewhere in a 28-page document. This is an example of "vague and unsubstantiated allegations." When Garringer tried to narrow Lundberg to a single specifity, the Hearing Officer struck the portion of the complaint alleging "false statements" by Garringer. Thus, Garringer was left standing ready to prove that each statement he made was true, and evidenced by a part of record where the fact appeared. App.11. However, Garringer was deprived of any opportunity to prove that each statement was true and warranted, since the truth of matters asserted was irrelevant.

IV. THIS PETITION CONCLUSIVELY DEMONSTRATES THAT INDIANA IS A KLEPTOCRACY AND AN IMPORTANT QUESTION OF GRAVITY IS RAISED AS TO WHETHER OR NOT THE STATE OF INDIANA IS GOVERNED UNDER LAW

Rule 1.15(b) of the Indiana Rules of Professional Conduct is plain that lawyers

"shall promptly account" for property in their custody in which third parties have an interest. Rule 1.15(b) articulates the basic rule of integrity that a lawyer shall not help himself to money to which he is not entitled. The Wades had an interest in Schedule B-1 accounts, and the collection of the Hartwick account, since this money should have gone to pay the outstanding taxes of Wade Trucking. 11 U.S.C., Sec. 507. Instead, the Wades, as principal officers of Wade Trucking, have to pay, and are paying, the taxes that should have been paid from the proceeds of Schedule B-1 accounts, and, the Wades have to pay the taxes on the amounts collected from Schedule B-1, since Hartwick and other account debtors reported this income as paid to Wade Trucking.

However, when the Wades filed a complaint with the Indiana Supreme Court Disciplinary Commission alleging the theft and concelament of Schedule B-1 assets by attorneys Edward B. Hopper and Robert Sheaffer, Lundberg responded that these allegations did not constitute

attorney misconduct. This is a far departure from the law. Rule 1.15(b), supra. If there had been the normal operation of the law, we would not have to speculate as to the evidence in this matter. In Re: Sawyer, supra. Lundberg knows what right attorney Sheaffer had to the proceeds of the Hartwick account listed on Schedule B-1, but this information is privileged. B.App. 10, and 11-14. Again, a far departure from the law. Jim's Garage, supra.

According to an investigation of the General Accounting Office, Indianapolis, Indiana, is the source of numerous complaints about the bankruptcy courts, and the failure of bankruptcy trustees to account for the property entrusted to their care is a commonplace occurence in Indianapolis. BANKRUPTCY TRUSTEES, Oversight Improved, But Extent of Trustee Fraud is Unknown, GAO/GDD-83-54, published January, 1993, at pages 5-6. The failure of bankruptcy trustees to account for property in their care and the administration of justice in the bankruptcy

courts in Indianapolis are the subject of public attention and comment. See,Editorial of The Indianapolis Star, "Is Justice Bankrupt?" published March 30, 1990.

The opinion of the lower court notes "[t]he attached appendix consisted of numerous documents, letters, financial statements, cancelled bank checks, and selected excerpts from depositions, presumably intended to document the open statement and support the assumptions and accusations contained therein." App. 6. The opinion concludes "Respondent only had vague and unsubstantiated proclamations of wrongdoing without a single specifity." App.9.

From the foregoing passages of the opinion, it is clear that the lower court fails to understand that the reduction of the Hartwick account on Schedule B-1 to money by a lawyer, is a "single specifity" of an item of property that needs to be accounted for. Rule 1.15(b), supra.

The sole inference that can be drawn from the foregoing authority and record is that

there is a "kleptocracy" [1] in the State of Indiana where lawyers routinely steal property entrusted to their care. Thus, this petition demonstrates an important question of gravity as to whether or not the State of Indiana is governed under the Laws and Constitution of the United States. Marbury -v- Madison, 1 Cranch 137, 2 L.Ed. 60 (1803).

This Court has held that when a fiduciary's dealings are challenged, his dealings are subjected to rigorus scrutiny. Pepper -v- Litton, 308 U.S. 295, 306-307, 60 S.Ct. 283, 84 L.Ed.2d 281 (1940). A fiduciary cannot violate the rules of fair play to conceal information required by law to be revealed, and utilize his unique acess to information for his own preferment. 308 U.S. at 310. However, this Court has not made it clear in any opinion that a lawyer is a "fiduciary",

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Footnote 1 - "kleptocracy" - ancient Greek, "klepto-", to steal, and "-acracy", a system of government.

with duties to account for property in his care. A clear opinion on this will eliminate any confusion by lower courts concerning the evidence before them, such as demonstrated by the lower court here [App.6 and 9, supra.], correct far departures from the law, and assure the citizens of Indiana that they too are governed under the law.

V. THE FAR DEPARTURES FROM THE LAW DEMONSTRATED HEREIN IMPAIRS THE PROCEDURAL DUE PROCESS RIGHTS OF SIX MILLION CITIZENS

Of course, "the right to be heard would be of little avail" if it did not comprehend the right to be heard by counsel. Goldberg -v- Kelly, supra, 397 U.S. at 270-271. Indiana has six million citizens. If this counsel is limited to lawyers who must only say pleasant things and must remain mute when wrongdoing is observed as a precondition to practice, then the fundamental constitutional right of six million citizens to be heard when they are deprived of their rights and interests under the law is of little avail. Id.

Garringer reported to the President that

lawyer Edward B. Hopper, serving as a bankruptcy trustee, filed a complaint against George and Joyce Wade for perjury, fraud, and concealment of bankrupt estate assets and records, without a single fact to support Hopper's allegations. He reported that Hopper directed the search of the Wade home without warrant or authority from any court. He reported that Hopper redirected the Wades' personal mail without authority from any court. He reported that Hopper appropriated the Wades' personal bank account without the authority of any court and without notice to the Wades. These are all far departures from the law. In a series of articles, The Indianapolis Star reported victims similar to the Wades. See, Editorial of The Indianapolis Star, 3/30/90, supra. Those who went to early graves because this could happen in America, will not be affected if this Court exercizes its authority in this matter. Id.

VI. THIS PETITION DEMONSTRATES THAT THE RESPONDENT HEREIN WILL BE UNABLE TO RESPOND WITH AN INTELLIGIBLE BRIEF IN OPPOSITION WITH AUTHORITY IN THE LAW

Garringer filed a Petition for Application for Rehearing from the opinion of the lower court with an Appendix identical to Appendix "B" reproduced in this petition. App. 1. It raised the identical arguments and articulations. It quite firmly and plainly asked what right or interest attorney Sheaffer had to the Hartwick account of Schedule B-1, and what happened to the other items of property listed on Schedule B-1. Respondent Lundberg was unable to respond an intelligible response with authority in the law. Id. The lower court did not make any resonse with authority in the law. Id. They never could.

Thus, in the event this Court requests Respondent Lundberg to file a brief in opposition, Lundberg will be unable to articulate an intelligible response with authority in the law. That is because there is none. A brief in opposition will only further demonstrate the far departures from the law here. Respondent Lundberg will not tell us what happened to the items of property

listed on Schedule B-1, and cannot articulate an intelligible reason for not doing so.

CONCLUSION

For the foregoing reasons, this petition has demonstrated far departures from the law, far departures from the usual and accepted course of proceedings, and important questions of gravity that have never been addressed by this Court. The exercize of discretionary authority by this Court will remedy grave injustices done to members of the public, serve to protect the fundamental constitutional rights of millions of citizens, and be a touchstone for the lower courts.

PRECISE RELIEF REQUESTED

Petitioner asks that the Respondent be required to file a Brief In Opposition pursuant to Rule 15.1 of the Rules of the Supreme Court. Upon this further demonstration of far departures from the law, Petitioner asks that Writ of Certirari be granted, and opinion of this Court consistent with the law.

APPENDIX OF DECISIONS
TO PETITION FOR WRIT OF CERTIORARI

Order of the Indiana Supreme Court
dated 3/15/94 denying Petition for
Application for Rehearing..... 1

Opinion of the Indiana Supreme Court
filed 1/15/94, and reported at
626 N.E.2d 809.....2-15

IN THE SUPREME COURT OF INDIANA

IN THE MATTER OF:	)
	) Case No.
DONALD MARK GARRINGER	) 49S00-9206-DI-491

ORDER DENYING PETITION

FOR APPLICATION FOR REHEARING

Comes now the Respondent in this case, Donald Mark Garringer, and petitions this Court for rehearing of this matter.

And this Court, being duly advised, now finds that the Respondent has failed to address any flaw in this disciplinary case warranting further consideration by this court.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED by this Court that the Petition for Application for Rehearing, filed by the Respondent, Donald Mark Garringer, is hereby denied.

[Directions for service omitted.]

DONE at Indianapolis, Indiana, this 15th day of March, 1994.

Sullivan, J., not participating.

IN THE SUPREME COURT OF INDIANA

IN THE MATTER OF:	)	
	)	Case No.
DONALD MARK GARRINGER	)	49S00-9206-DI-491

DISCIPLINARY ACTION

Per Curiam

Donald Mark Garringer, the Respondent here, was charged by verified complaint for disciplinary action with several violations of the Rules of Professional Conduct for Attorneys at Law. This Court appointed a Hearing Officer pursuant to Ind. Admission and Discipline Rule 23, Section 11(b) and after hearing, he tendered to this court extensive findings of fact and conclusions of law. Respondent thereafter petitioned this Court for review of the hearing officer's report and fully briefed his position.

This Courts review in disciplinary cases is de novo, and we examine all matters presented. In Re: Young (1989), Ind., 546 N.E.2d 819. Our review is of the entire record tendered in the case, including the Hearing Officer's findings and conclusions, which are given special

emphasis as they are the products of direct observation of the witnesses. In re Blackwelder (1993), Ind., 615 N.E.2d 106, In Re Stanton (1986) Ind., 492 N.E.2d 1056. Nonetheless, this court remains the final factfinder and arbiter of misconduct, and we reserve the right to determine an appropriate sanction. In Re: Ortiz (1992), Ind., 604 N.E.2d 602, In Re Rajan (1988), Ind., 526 N.E.2d 1185. The Respondent's objections to the findings of the Hearing Officer will be resolved within the context of this review process.

We have reviewed all matters submitted, and now find that the charges contained in the disciplinary complaint arise out of Respondent's writing and disseminating a 28-page document, entitled "An Open Statement to the President Of The United States Concerning Federal Judges and Federal Officials Bought and Paid For From the Largesse of Looted Bankrupt Estates" (hereinafter "open statement"), on July 24,

1989. Attached to the open statement was a 58-page document entitled "Appendix To Open Statement To The President Of The United States" (hereinafter "appendix"). The open statement contained allegations of misconduct on the part of officials of the the United States Bankruptcy Court for the Southern District of Indiana and the Federal District Court for the Southern District of Indiana in connection with a bankruptcy action heard there in which respondent particpated as counsel for the bankrupts.[1] Included in the open statement were the following excerpts, culled from paragraph headings and text:

Footnote 1
The circumstances leading to Respondent's writing of the open statement are briefly as follow. George and Joyce Wade retained Respondent in December, 1986, to represent them in connection with two bankruptcy petitions they had filed previously. The Wades filed for personal bankruptcy in the United States Bankruptcy Court for the Southern District of Indiana pursuant to Chapter 7 of the bankruptcy code. Additionally, the Wades filed for Chapter 7 bankruptcy for their business, U.G. Wade Trucking, Inc. Apparently, the Wades wanted Respondent to investigate alleged wrongdoing on the part of the judges and other judicial officials involved in their bankrupties. [sic] The allegations of wrongdoing centered on the liquidation of debts due on Wade Trucking's schedule B-1 accounts.

II.Criminal Theft and Concealment of Assets Listed on Schedule B-1 Of the U.G. Wade Trucking Inc.....

V. The Failure of Judicial Officers In The Southern District of Indiana To Administer Justice...

VI. The Criminal Activity In The Wade Bankruptcy Is Not An Isolated Instance, But an Example Of A Pattern Of Racketeering Activity By Corrupt Judges And Lawyers under the Shield and Authority of the United States That Is A Matter Of Public Attention and Comment

IIX. [Sic] Charges Based On The Four Corners Of The Wade Bankruptcy...

I charge the Honorable Robert L. Bayt with the failure to require Trustee Hopper to account for bankrupt estate assets as required by law to do so, the failure to require Trustee Hopper to provide information relating to the liquidation of bankrupt estates as required by law to do so, the concealment of record in a malicious scheme with Edward B. Hopper, II, to defeat the administration of justice, the failure to act upon coming into certain knowledge of criminal activity in the liquidation of the estates in the Wade bankruptcy, and, by implication, of sharing in the largesse of looted bankrupt estates...

I charge Magistrate Kennard P. Foster of depriving poor and oppressed litigants of a level playing field in favor of vested and influential players, contrary to his Oath of Office, possibly out of ignorance or instruction from the presiding Judge, the Honorable John Daniel Tinder.

I charge the Honorable John Daniel Tinder of having in his hand definitive evidence of violations of the Laws of the United States, and entering Protective Orders and stays prohibiting discovery and the administration of justice, contrary to the Laws of the United States, with the intention of assisting and comforting persons who have violated the Laws of the United States so that they may escape apprehension.

As a whole, the open statement described a far-reaching conspiracy involving judges, bankruptcy trustees, United States Attorneys, and other federal court officials, allegedly devised to illegally convert assets properly belonging to bankrupt estates. The attached appendix consisted of numerous documents, letters, financial statements, cancelled bank checks, and selected excerpts from depositions, presumably intended to document the open statement and support the assumptions and accusations contained therein. Respondent distributed the open statement and appendix to the President of the United States and other high-level federal and state officials, judicial officers, and judges, with the explanation that he had

> exhausted all forms of judicial and administrative relief, [and therefore resorted to] writing to [the President of the United States] respectfully in [his] capacity as Chief Executive Officer of this great country who is charged with the duty of enforcing the Laws and the Constitution of the United States

Respondent concluded the open statement with the following observations:

> I realize that bringing these charges may expose me to sanctions and discipline as an attorney...[h]owever, I bring these charges without apprehension. I am outraged by the criminal activity that has occured [sic] in the U.S. Bankruptcy Court and the misadministration of justice that has allowed this activity, not only because of the victims who have suffered, but because of what the crooked lawyers and judges have done...

The Hearing Officer concluded that Respondent violated Ind. Professional Conduct Rule 8.2(a) in that he made statements with reckless disregard as to their truth or falsity concerning the qualifications and integrity of a judge and of other adjudicatory officers; and that he violated Prof.Cond.R. 8.4(d) by engaging in conduct prejudicial to the administration of justice. The Hearing Officer further found that the Commission failed to prove by clear and convincing evidence that the Respondent engaged in conduct intended to disrupt a tribunal contrary to Prof. Cond.R. 3.5(c), as charged in the complaint.

Respondent challenges several of the

Hearing Officer's findings. He contends that there is no evidence that he made the open statement public. However, we find that Respondent himself indicated on the face of the open statement that it was being distributed to the "U.S. Attorney General, Director, F.B.I. [Certified], Executive Director - Office of the United States Trustee, Indiana Senators and Congresspersons, 7th Circuit Court of Appeals, Indiana Supreme Court, Governor of Indiana, All interested parties." Respondent doesn't challenge this fact but argues that his report, made to the proper authorities, did not undermine public confidence in the integrity of the judiciary, and, therefore, was not proscribed by the Rules of Professional Conduct. Prof.Cond.R. 8.2(a) provides that lawyers "shall not make offending statements, as they are defined by the rule. Violation does not require that such statements be dispersed among the general public. It is enough that the statements are publicized to another individual. Respondent's

distribution to the President and "all interested parties" constitutes the making of a statement pursuant to Prof.Cond.R. 8.2(a).

Respondent also contends that he was required to distribute his open statement pursuant to Prof.Cond.R. 8.3(b), which provides that a lawyer who has "knowledge" of a judge's violation of applicable rules of judicial conduct which raises a substantial question as to the judge's fitness for judicial office shall inform the proper authorities. However, Respondent failed to show that he had actual knowledge of such wrongdoing on the part of the named judicial officials, as evidenced by the content of his open statement. Respondent only had vague and unsubstantiated proclamations of wrongdoing without a single specificity. The Court will not retry the Wade bankruptcy or Respondent's broad allegations of malfeasance therein. Suffice it to say that we are unaware of an iota of reliable evidence supporting Respondent's assertions of judicial misconduct

such as to remove them from the realm of mere speculation and conjecture. In light of this, his assertion that he was duty-bound to report misconduct is untenable.

Respondent also asserts that the disciplinary complaint was impliedly amended, and that such amendment deprived him of notice of the charges, as required by In re Roberts (1983), Ind., 442 N.E.2d 986. Respondent contends the amendment occurred when the Hearing Officer struck language referring to knowledge of falsity from paragraph four of the complaint, which charged that Respondent made statements with knowledge of their falsity or with reckless disregard as to their truth or falsity concerning the integrity of judges and other judicial officers. Respondent asserts that he was prepared to prove that the allegations in his open statement were true, and that the striking of language pertaining to knowledge of falsity somehow denied him of notice of the charges. We find that argument to be without merit.

The amended complaint, of which Respondent had adequate notice prior to hearing alleged in paragraph four that Respondent made statements that he knew to be false or with reckless disregard as to their truth or falsity. Respondent was not denied adequate notice of the charge, since it was contained in the amended complaint both before and after the Hearing Officer struck portions of paragraph four.

It is further contended by respondent that several procedural shortcomings involving discovery and evidentiary issues tainted the disciplinary process, denying him due process. In each instance, the crux of Respondent's argument is that he was denied a full opportunity to prove the truth of the assertions contained in the open statement, and, thereby, to prove that he was duty bound to report the misconduct. However, as we concluded above, Respondent failed to show any factual basis whatsoever that could even remotely lead to reliable evidence supporting

Respondent's theory of widespread conspiracy. The Hearing Officer was persuaded by this fact when he concluded that Respondent made the scathing statements with reckless disregard as to their truth or falsity. We agree, and conclude that Respondent's allegations of procedural deficiency are without merit.

We, therefore, find that Respondent's writing and distributing the open statement violated Prof.Cond.R. 8.2(a) in that he made statements with reckless disregard as to their truth or falsity concerning the qualifications and integrity of a judge and of other adjudicatory officers; and that by writing and distributing the document, he engaged in conduct prejudicial to the administration of justice, thereby violating Prof.Cond.R. 8.4(d). We agree with the Hearing Officer that there is insufficient evidence to support a finding that Respondent violated Prof.Cond.R. 3.5(c).

Now that we have found misconduct, it is the duty of this court to assess an

appropriate sanction. In doing so, we examine several factors: the duty violated, the state of mind of the Respondent, the actual or potential injury caused by the lawyer's misconduct, and factors in mitigation or aggrivation. In re La Cava (1993), Ind., 615 N.E.2d 93. We note that the duty violated by the Respondent was his obligation to refrain from acting in a way that damages the integrity of the judicial system. His actions did not injure any individual client. Rather, his conduct threatened to unfairly undermine public confidence in the administration of justice." See Comment to Prof.Cond.R. 8.2. As we have stated "[u]nwarranted public suggestion by an attorney that a judicial officer is motivated by criminal purposes and considerations does nothing but weaken and erode the public's confidence in an impartial adjudicatory process." In re: Terry (1979), 271 Ind.499,502, 394 N.E.2d 94. Unfortunately, Respondent's open statement reveals that he was fully aware that, by its distribution, he

was violating the Rules of Professional Conduct. Such knowledge imparts added culpability to Respondent's acts.

There are several factors in mitigation. Respondent's motivation for writing the offending document appears to have been a sincere desire to represent his clients diligently. Respondent was not seeking personal gain, but rather was vigorously attempting to protect the interests of his clients, albeit misguidedly.

In light of the above considerations, we are convinced a period of suspension adequately addresses the severety of Respondent's misconduct. Further, a suspension for a limited time is approprate in cases, such as tis one, where the offender is not a continued threat to his clients. The imposition of sanction here will also serve to apprise other practitioners that this court will not tolerate this type of reckless and unsubstantiated diatribe. We are further convinced that Respondent's readmission to the

the Bar must be subject to his sucessfully proving to this Court that he has met the elements necessary for reinstatement as set out in Admis.Disc.R. 23, Sections 4 and 18. It is, therefore, ordered that the Respondent Donald Mark Garringer, be suspended from the practice of law for a period of not less than sixty (60) days, begining February 7, 1994, at the end of which he may petition this Court for reinstatement under Admis. Disc.R. 23(18).

Costs of this proceeding are assessed against Respondent.

Sullivan, J., not participating.

APPENDIX "B"
APPENDIX OF RECORD
TO PETITION FOR WRIT OF CERTIORARI

Schedule B-1 of bankruptcy petition of the U.G.Wade Trucking, Inc.,.....1-2

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UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF

IN RE
U. G. WADE TRUCKING, INC. Debtor

CASE NO
CHAPTER

SCHEDULE B — STATEMENT OF ALL PROPERTY OF DEBTOR

Schedules B 1 B 2 B 3 and B 4 must include all property of the debtor as of the date of the filing of the petition [illegible]

Schedule B-1 — Real Property

[illegible]	[illegible]	[illegible]
Golden Eagle Express, Inc. (T.J. Woods - Philip Beyers) Shelbyville, IN 46176		$ 13,650
Jerry W. Anders 222 St. Mary Street Shelbyville, IN 46176		4,500
James R. Marshall Blanchard Street Shelbyville, IN 46176		6,800
Joseph Kilby Jole, Inc. Indianapolis, IN		3,500
T&P Leasing Pawtucket, RI 02860		5,326
Cal-Ark Ft. Smith, AR 72901		10,599
Clancy Carting 795 Beahan Rd. Rochester, NY 14603		6,166
Bruce Johnson Johnson Bro's. Transportation Tucson, AZ 85702		6,240
Central School Supply (Don Wassel Louisville, KY 40201		1,400
London Express 21935 Van Buresen Grand Terrace, CA 92324		7,897
Hartwick Trans. Phoenix, AZ 85026		5,187
Heyhansen, Inc. Plymouth, NC 27962		343
	Total	71,610

The Blanks Press, Inc., Box 237, Fort

EXHIBIT B-1

Statement of all Property of Debtor
(Cont'd.)

Transportation, Inc. Salinas, CA 93901	$ 1,200.00
Top Line Express Chicago, IL 60607	825.00
Shamrock Trans. Pryor, OK 74361	1,042.00
TLC Truck Lines 5012 East 62nd Indianapolis, IN 46220	1,190.00
Nationwide Carriers, Inc. 3717 Bridger North Drive Indianapolis, IN	912.56
Nationwide Truck Lines P.O. Box 699 Ennis, TX 75119	1,200.00
Medford Transport 21 Hackensack Ave. Kearny, NJ 07032	6,210.06
Transurface Carriers Westborro, MA 01581	1,250.00
	$13,829.62
Total brought forward	71,610.94
TOTAL -	$85,440.56

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HOPPER & OPPERMAN
LAWYERS
707 MERCHANTS BANK BUILDING
11 SOUTH MERIDIAN STREET
INDIANAPOLIS, INDIANA 46204

January 17, 1986

Hartwick Transportation
Phoenix, AZ 85026

Attn: Accounts Payable

Re: U. G. Wade Trucking, Inc.

To Whom It May Concern:

Enclosed please find a copy of the order appointing Edward B. Hopper, as Interim Trustee in the bankruptcy proceeding for U. G. Wade Trucking, Inc.

According to the Debtor's schedules, your firm owes the sum of $ 5,187.30 . Please remit such amount directly to the Trustee at the address shown above.

If your firm has paid such sum to any individual in the past 3 months, please advise me to whom such payments were made, the approximate date of such payment, the amount, and if possible, send me a copy of the cancelled check and the endorsing signature.

Your cooperation and assistance will be greatly appreciated.

Very truly yours,

Kevin P. Dempsey

KEVIN P. DEMPSEY

KPD/cld
Enclosure

Attached are copies of our settlement sheets & copies of the back & front of our checks. Also enclosed is a letter from Mr. Wade & Robert L. Schaffer. Please let me know if you need anything else we show Wade paid in full.
A. Costello

HARTWICK TRANSPORTATION
POST OFFICE BOX 6900
PHOENIX, ARIZONA 85005
(602) 200-2301

0004320

DATE 1/14/86

THE SUM 1064 DOLS 52 CTS

$1064.52

PAY TO THE ORDER OF
Jole Inc./Wade Trucking
c/o Robert L. Sheaffer
207 Methodist Building
Shelbyville, Indiana 46176

HARTWICK TRANSPORTATION INC.

James F. Hartwick

⑈0004320⑈ ⑆122100024⑆ 2266-1344 ⑈0000106452⑈

HARTWICK TRANSPORTATION INC.
POST OFFICE BOX 6900
PHOENIX, ARIZONA 85005
(602) 200-2301

0004321

DATE 1/14/86

THE SUM 936 DOLS 80 CTS

$936.80

PAY TO THE ORDER OF
Jole Inc./Wade Trucking
c/o Robert L. Sheaffer
207 Methodist Building
Shelbyville, Indiana 46176

HARTWICK TRANSPORTATION INC.

James F. Hartwick

⑈0004321⑈ ⑆122100024⑆ 2266-1344 ⑈0000093680⑈

the interest of brevity, what we are here today on, the specific issue of trustee's fees and counsel fees. I don't see the relevance as to whether I did or did not see certain documentary evidence with respect to some collections. So, I would object on that basis, Your Honor.

MR. GARRINGER: Our response to the objection is we made the allegations that Charles Kilby and Jole, Inc. and the clients of Robert L. Sheaffer had collected these accounts receivable. We shoveled over that documentary material, we pumped it into the record. I guess the question -- the ultimate question we are asking of you, Mr. Shook, is, did you ever inquire with Robert L. Sheaffer or Mr. Kilby as to whether or not they collected these accounts receivable?

MR. HARRIS: I object, Your Honor We had a two and a half day hearing.

THE COURT: What we dealt with before was the petition to abandon those accounts, and at that time we went through all this. And so at this point I fail to see how that helps get to the ultimate conclusion here as to whether this should be --

MR. GARRINGER: My question is why didn't Mr. Shook ask Kilby and Sheaffer to account for assets of the bankrupt estate, as required by law to do so, pursuant to 6002?

THE COURT: I think you asked him that. I think you asked him that on his petition to abandon. I'll let him answer the question. Go ahead.

A. Which property are we talking about?
Q. We are talking about M & P Leasing, talking about Clancy Carting, talking about Hartwick.
A. As I indicated before, I had conversations with all of those gentlemen, as well as Mr. Sheaffer --
Q. Sir, pardon me. I heard that answer before.
THE COURT: Excuse me. He just wants to know if pursuant to -- was it 6002 -- you asked for an accounting as if they were custodians.
THE WITNESS: No, I did not.
Q. Why not?
A. They had already given me the answers as to why they were not going to pay any monies over to this estate, and there was absolutely no reason for me to file any kind of documentation as to they should. If, in fact, I believe it is still an account receivable problem with setoffs thereto, I'm not about to file reports. I'm going to do my job, do my duty, which is make a determination of whether it is collectible, or not, and then come forward to this Court, as I did previously, and say I don't believe these are collectible and ask that the Court allow me to abandon them, which I did.
Q. Going to 7/16/88. You see "7/16/88, n.e.s objection to debtor's amended B-47"
A. I see that entry, yes.
Q. And then down at 9/12/88, "review pleadings. Objection to

compensation. We would be happy to see him awarded compensation if he can show us documentary material where he deserves --

THE COURT: Just a second. The Court has already explained what its view is on the subpoena to this witness. And is there somebody here from Hostetler & Kowalik representing them?

MR. COOTS: Yes, Your Honor, Dave Coots.

THE COURT: Mr. Coots, what is your position on the subpoena?

MR. COOTS: That is probably the third or fourth subpoena identical that has been served on Hostetler & Kowalik since the commencement of this litigation, and all documents that relate to the business records of U. G. Wade Trucking Company, Inc. have been tendered either to Trustee Shook or provided to Mr. Garringer through supplementry production by myself, other than those that are contained in what are nominated the litigation files that are maintained by the law firm that include pleadings that are found in the bandruptcy clerk's office here in this building or items of work product or privileged communications to the Trustee. In June of 1988 the issue of privilege was presented to Magistrate Foster, I believe it was, or could have been Judge Tinder, and that motion to quash is still pending.

THE COURT: Let me get to it. Your view is, pursuant to your understanding, you are served with this subpoena,

requests 1 and 2, and you, as an officer of the court, are indicating to the Court that everything that you had in that office that is of relevance that is not privileged pursuant to the lawsuits that have been filed against your clients has already been turned over or has either been turned over to Mr. Garringer or is in Mr. Shook's file?

MR. COOTS: Correct.

THE COURT: You submit that to the Court as an officer of the Court?

MR. COOTS: That's correct.

THE COURT: Now, Mr. Garringer --

MR. COOTS: So that I am clear, there are documents in the litigation files maintained by Hcstetler & Kowalik that we assert -- or that we believe are protected by our client privilege that we have not produced. That pertains to the litigation that was brought in various aspects in the underlying bankruptcy, the core bankruptcy adversarial proceedings, things of that nature, that went on during the course of the lawyers for the Trustee's efforts to collect money that the Wades indicated was out in Johnson County or was off somewhere else, and things like that.

THE COURT: So, Mr. Garringer, you have asked these people to come in here with everything they have got to substantiate this final report, and they have told you that you either already have got it or Mr. Shook has got it. That is

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STATE OF INDIANA, SS:

The State of Indiana, to Donald L. Lundberg, Executive Secretary,
Indiana Supreme Court Disciplinary Commission, ISTA Bldg., Indianapolis, IN 46204

Greeting: This is a subpoena to witness and/or subpoena duces tecum

Pursuant to A.D. Rule 23, § 9(f), Ind. Ann. Stat. (Court Rules)

you are hereby commanded to appear personally in connection with:
FINAL HEARING IN THE INDIANA SUPREME COURT CONFERENCE ROOM THIRD FLOOR, THE STATEHOUSE,
INDIANAPOLIS, INDIANA, on Wednesday, the 7th day of
October, 19 92, at 9:30 a.m. before the
DISCIPLINARY COMMISSION OF THE INDIANA SUPREME COURT

and then and there to have this writ.

YOU ARE FURTHER COMMANDED TO: Contact Mark Garringer, Respondent. at 2802 N. Delavare St., Indianapolis, IN., (317) 925-4110, on or before Thursday, October 1, 1992, and produce on or before that date the following documents and/or records in your possession, custody and/or control. (1) All documents and/or records containing information that evidence, reference or otherwise indicates any act, or attempt, to collect or receive by any person(s) and/or entity(s) the accounts receivable of the U.G. Wade Trucking, Inc., after October 1, 1985, as to any of the amounts listed on the Schedule B-1 included in the bankruptcy petition of U.G. Wade Trucking, Inc., filed December 30, 1985, in the U.S. Bankruptcy Court for the Southern District of Indiana, under case no. IP85-6003-R, a copy of which is attached hereto and marked Exhibit "A". (2) In particular, produce all documents and/or records containing information that evidence, reference or otherwise indicates that Merchants National Bank & Trust Company of Indiana collected and/or received, or attempted to collect or receive, the accounts receivable from Cal-Ark, Bruce Johnson and/or Medford Transport as listed on the Schedule B-1 attached hereto and marked Exhibit "A". Mark Garringer will advance all reasonable costs for reproducing documents in response to this subpoena upon request of the witness. 3

(3) Also please produce any documents in your possession, custody or that would evidence, suggest or innuendo that Robert L. Sheaffer and/or his client Charles Kilby d/b/a Jole, Inc., had any right, title or interest in the checks of Hartwick Transportation reporduced at pages 26 and 27 of Appendix to Garringer's Statement to the President and pages 5-6 of Appendix to Garringer's Answer.

Charles M. Kidd

Dated this 1st day of August, 1992.

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DAP

IN THE SUPREME COURT

OF THE

STATE OF INDIANA

IN THE MATTER OF)
) SS: CAUSE NUMBER 49S00-9206-DI-491
DONALD MARK GARRINGER)

COMMISSION'S MOTION TO QUASH AND FOR
PROTECTIVE ORDER REGARDING
RESPONDENT'S SUBPOENA TO THE DISCIPLINARY COMMISSION

The Indiana Supreme Court Disciplinary Commission ("Commission"), by its counsel and Executive Secretary, Donald R. Lundberg, respectfully moves the Honorable Dixon W. Prentice, Hearing Officer, for an Order quashing the subpoena served by the Respondent on the Commission on or about September 21, 1992 and for a Protective Order relating to the same. In support of this motion, the Executive Secretary would show the Hearing Officer the following:

1. This subpoena was issued in connection with the currently pending disciplinary action bearing the caption above.

2. Respondent's seeks, essentially, four things by this subpoena:

a. The testimony of the undersigned at the final hearing in this disciplinary case on October 7, 1992 at 9:30 a.m.;

b. Information apparently claimed by Respondent to be in the possession of the Commission explaining who collected the monies of the Accounts Receivables debtors on Schedule B-1 of the bankruptcy petition of the U.G. Wade Trucking Company;

c. Information apparently claimed by Respondent to be in the possession of the Commission indicating that Merchants National Bank had collected a portion of the assets listed on Schedule B-1 of the Wade Trucking Bankruptcy Petition; and,

d. Information apparently claimed by Respondent to be in the possession of the Commission indicating that Shelbyville attorney Robert Sheaffer, or his client Charles Kilby, had a "right, title or interest" in monies collected from Hartwick Transportation.

3. With respect to the documentary materials sought by Respondent seeking information as to who collected monies listed on Schedule B-1, and as to whether Merchants National Bank collected monies listed on Schedule B-1, the Commission seeks to quash the subpoena on the grounds that the Commission has no records of its own demonstrating any thing or process described in Respondent's subpoena.

4. With respect to the documentary materials sought, the Commission is not the custodian of the original records of any of the materials sought admissible or to which the Commission would be competent to lay a foundation for the admission of these records sought by Respondent's subpoena and, therefore, does not possess any records sought by the subpoena.

5. Because of Respondent's long term involvement in the Wade bankruptcy and its affiliated cases, any information sought by Respondent from the Commission must otherwise be in his possession or in the possession of Merchants or Sheaffer.

6. As a result of the Commission's lack of information contained in the subpoena and purportedly sought by Respondent, the Executive Secretary would have no facts on which to

provide testimony in this disciplinary action and would respectfully move to quash the subpoena on this ground as well. The Executive Secretary is not a perceptory witness and is incompetent to testify on underlying transactions as neither he, nor any member of his staff nor the Disciplinary Commission itself has any personal knowledge regarding these transactions.

7. Because the Commission is currently prosecuting Respondent for violations of the Rules of Professional Conduct for Attorneys at Law, the Executive Secretary is aware of the allegations contained in the Verified Complaint for Disciplinary Action filed in this matter on June 25, 1992. The Commission also moves to quash the subpoena on the ground that the information sought by Respondent is not relevant to the truthfulness of the assertions he made in the "Open Statement to the President..." of July 1989. The reasonableness of the Respondent's accusation in the Open Statement should be judged according to what the Respondent knew at the time of his accusations.

8. With respect to the materials Respondent seeks regarding attorney Sheaffer, the contents of investigative files maintained by the Disciplinary Commission are not discoverable by Respondent under Admission and Discipline Rule 23, §22 which provides for only limited public disclosure of information after the filing of a Verified Complaint for Disciplinary Action. Said rule does not provide for any disclosure of information during the investigative phase.

9. With respect to the materials Respondent seeks regarding attorney Sheaffer, the contents of investigative files

maintained by the Disciplinary Commission are not discoverable by Respondent under Trial Rule 26(B)(3) which protects the disclosure of material prepared in anticipation of litigation.

WHEREFORE, the Indiana Supreme Court Disciplinary Commission, by its counsel and Executive Secretary, respectfully prays for an Order quashing Respondent's subpoena described hereinbefore, for a protective order to the Commission's benefit and for all other relief just and proper.

Respectfully submitted,

Donald R. Lundberg
Executive Secretary
Attorney number 8945-49

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing "Commission's Motion to Quash and for Protective Order Regarding Respondent's Subpoena to the Disciplinary Commission" has been duly served upon the individuals listed below by Hand Delivery, this 24th day of September, 1992:

Hon. Dixon W. Prentice
Hearing Officer
8516 Bent Tree Court
Indianapolis, IN 46220

Donald Mark Garringer
Attorney at Law
2802 North Delaware Street
Indianapolis, IN 46205

Donald R. Lundberg
Executive Secretary

Indiana Supreme Court Disciplinary Commission
628 I.S.T.A. Center
150 West Market Street
Indianapolis, Indiana 46204
Telephone: (317) 232-1807
DRL/cmk/QUASH

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you add it all up and the all the numbers came out?

U. S. TRUSTEE STEWART: That is part of it.

THE COURT: Explain to me what certification of Trustee means.

U. S. TRUSTEE STEWART: We have certain forms all the trustees have to follow and fill in the blanks and everything, and then we look through there and we make sure that we have a good tracing of all the assets that were initially listed on the inventory, that they have been accounted for, that all the debts are paid, everything just balances out.

THE COURT: You have an audit?

U. S. TRUSTEE STEWART: Yes. Not an extensive audit, but, yes, an audit on each one.

THE COURT: So, if something appears on the schedule someplace, you want to know what happened to it?

U. S. TRUSTEE STEWART: Right.

THE COURT: And you certify that everything on the face of this is in order?

U. S. TRUSTEE STEWART: Right, correct. We also function to review fees, trustee's fees, and maybe more importantly, attorney's fees, and we review all of them in Chapter 11. Then we view them randomly in Chapter 7 cases. In this case I have reviewed -- our office has reveiwed the fees in Mr. Shook's case because he is the one that is asking for attorney's fees, and I have some comments on that.

Supreme Court, U.S.
FILED
AUG 3 1994
OFFICE OF THE CLERK

No. 93-2094

In The

Supreme Court of the United States

October Term, 1994

IN THE MATTER OF:
DONALD MARK GARRINGER

DONALD MARK GARRINGER,

Petitioner,

v.

INDIANA SUPREME COURT
DISCIPLINARY COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Indiana

RESPONDENT'S BRIEF IN OPPOSITION

DONALD R. LUNDBERG
Executive Secretary
Indiana Supreme Court
Disciplinary Commission
115 West Washington Street
Suite 1060
Indianapolis, Indiana 46204
(317) 232-1807

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the petitioner's First Amendment claims were raised in the court below.

2. Whether the petitioner's First Amendment claims present a substantial federal question.

3. Whether the petitioner's other federal claims were properly presented to the court below so as to make those claims appropriate for a grant of certiorari.

4. Whether the petitioner's due process claims present a substantial federal question.

LIST OF PARTIES

The proper respondent to the Petition for Writ of Certiorari should be:

Indiana Supreme Court Disciplinary
Commission
115 West Washington Street, Suite 1060
Indianapolis, Indiana 46204
(317) 232-1807

Pursuant to Indiana Rule of Admission and Discipline 23, §11(e), disciplinary complaints against attorneys are to be filed by the Indiana Supreme Court Disciplinary Commission.

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No. 93-2094

In The

Supreme Court of the United States

October Term, 1993

IN THE MATTER OF:
DONALD MARK GARRINGER

DONALD MARK GARRINGER,

Petitioner,

v.

INDIANA SUPREME COURT
DISCIPLINARY COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Indiana

RESPONDENT'S BRIEF IN OPPOSITION

The respondent Indiana Supreme Court Disciplinary Commission respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Indiana Supreme Court's opinion in this case. That opinion is reported at 626 N.E.2d 809 (Ind. 1994).

JURISDICTION OF THE SUPREME COURT

As more fully set out under the Reasons for Denying the Petition, the Supreme Court lacks jurisdiction to review the decision below as to those claims that were not properly raised in the proceeding before the Indiana Supreme Court.

ADDITIONAL RULES INVOLVED

Indiana Rule of Professional Conduct (Prof.Cond.R.) 8.2(a) states:

> A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

Ind.Prof.Cond.R. 8.4(d) states:

> It is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice.

STATEMENT OF THE CASE

The respondent refers the Court to the factual statement contained in the opinion of the Indiana Supreme Court below for an objective statement of the facts of this case.

REASONS FOR DENYING THE PETITION

I. Petitioner's First Amendment Claims Were Not Raised Below

This lawyer disciplinary proceeding was initially tried to a hearing officer appointed by the Indiana Supreme Court, who issued his recommended findings of fact and conclusions of law on November 7, 1992. The petitioner did not raise claims under the First Amendment before the hearing officer, and the hearing officer did not include within his recommended findings of fact and conclusions of law any discussion of claims under the First Amendment.

Section 15(a) of Rule 23 of the Indiana Rules for Admission to the Bar and the Discipline of Attorneys (Admis.Disc.R.), governing lawyer discipline proceedings, states as follows:

> The respondent or Commission shall have thirty [30] days after the filing of the hearing officer's finding and recommendation to petition for a review of the same before the Supreme Court. If no petition for review is filed within thirty [30] days of the finding and recommendation of the hearing officer the Supreme Court shall enter judgment or such other appropriate order in the premises.

On May 4, 1993, the petitioner filed a petition for review of the hearing officer's findings and conclusions and an accompanying brief, pursuant to Ind.Admis.Disc.R.

23, §15(a).[1] There were nine specifications of error in his brief; however, none of them raised any claim under the First Amendment.

The Indiana Supreme Court rendered its final judgment on January 10, 1994. *In the Matter of Donald Mark Garringer*, 626 N.E.2d 809 (Ind. 1994). In the opinion below, the Indiana Supreme Court did not raise or decide any claims under the First Amendment on its own.

Thereafter, on January 27, 1994, the petitioner filed a Petition for Application for Rehearing, in which he raised certain issues for reconsideration. However, the petitioner did not mention any claims he had under the First Amendment in his Petition for Application for Rehearing.

On March 15, 1994, the Indiana Supreme Court denied the petitioner's Petition for Application for Rehearing without addressing the merits of any of the claims raised therein or any claims under the First Amendment. Appendix to Petition for Writ of Certiorari at App.1.

The petitioner did not raise his First Amendment claims before the Indiana Supreme Court and they were not decided by that court. He is attempting to raise his First Amendment claims in this Court for the first time. Accordingly, any claims under the First Amendment were

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[1] Neither the petitioner nor the respondent were notified of the filing of the hearing officer's recommended findings of fact and conclusions of law. Accordingly, the respondent did not then object, and does not now object, to the untimeliness of the petitioner's petition for review.

not properly preserved for review by this Court. 28 U.S.C. §1257(a); *Cardinale v. Louisiana*, 394 U.S. 437 (1969).

To the extent the petitioner is seeking review of the Indiana Supreme Court's interpretation of Ind.Prof.Cond.R. 8.2(a) and 8.4(d), no substantial federal question is presented for review by this Court. The Indiana Rules of Professional Conduct are promulgated by the Indiana Supreme Court in furtherance of its exclusive jurisdiction over the regulation of the practice of law in the State of Indiana. Absent a timely and properly raised question arising under the Constitution of the United States, the application and interpretation of those rules are purely questions of state law, over which this Court has no review jurisdiction. 28 U.S.C. §1257(a).

II. Petitioner's First Amendment Claim Does Not Present A Substantial Federal Question

Even if properly raised, the petitioner's claim under the First Amendment does not raise a substantial federal question. In her concurring opinion in *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 111 S.Ct. 2720, 2748 (1991), Justice O'Connor joined in a portion of the Chief Justice's dissent, thereby creating a majority of the Court in support of the view that:

> Lawyers are officers of the courts and, as such, may legitimately be subject to ethical precepts that keep them from engaging in what otherwise might be constitutionally protected speech. This does not mean, of course, that lawyers

> forfeit their First Amendment rights, only that a less demanding standard applies.

Id., 111 S.Ct. at 2748 (O'Connor, J., concurring).

The petitioner has pointed out no cases from the federal circuits or state courts of last resort that frame a significant division of authority concerning the federal constitutional limits to the words lawyers may use to attack the integrity of judicial officers. Indeed, the weight of authority is in support of the position of the Indiana Supreme Court that a lawyer may be properly subjected to disciplinary sanctions for making a statement impugning the integrity of a judge in reckless disregard for its truth or falsity. These cases have held that it does not violate the First Amendment rights of attorneys to hold them to an objective standard for evaluating whether a statement impugning the integrity of a judicial official is made with reckless disregard for its truth or falsity. *United States District Court v. Sandlin*, 12 F.3d 861 (9th Cir. 1993); *Standing Committee on Discipline v. Yagman*, 1994 WL 230338 (C.D.Cal. May 18, 1994); *Matter of Westfall*, 808 S.W.2d 829, 838 (Mo. 1990) *cert. denied*, 112 S.Ct. 648 (1991); *In re Disciplinary Action Against Graham*, 453 N.W.2d 313 (Minn. 1990), *cert. denied*, 498 U.S. 820 (1990). See also, *In the Matter of Holtzman*, 78 N.Y.2d 184, 573 N.Y.S.2d 39, 577 N.E.2d 30 (1991), *cert. denied*, 112 S.Ct. 648 (1991); *Ramirez v. State Bar of California*, 28 Cal. 3d 402, 169 Cal.Rptr. 206, 619 P.2d 399 (1980). That is, whether an attorney has acted recklessly is to be measured by "what the reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances." *Graham*, 453 N.W.2d at 322.

In the case below, the Indiana Supreme Court clearly held that the petitioner made statements that impugned the integrity of certain judicial officials without any support for those statements.

> Respondent failed to show that he had actual knowledge of such wrongdoing on the part of the named judicial officials, as evidenced by the content of his open statement. Respondent only had vague and unsubstantiated proclamations of wrongdoing without a single specificity.

626 N.E.2d at 812. Accordingly, the petitioner has failed to demonstrate that this case presents a substantial federal question under the First Amendment that would warrant granting the petition for writ of certiorari.

III. Petitioner's Other Claims Were Not Properly Preserved For Review By This Court

Ind.Admis.Disc.R. 23, §15(c) provides:

> In the event a party does not concur in a factual finding made by the hearing officer and asserts error in such finding in the petition for review, such party shall file with the petition for review a record of all the evidence before the hearing officer relating to this factual issue.

The petitioner filed no portion of the transcript of evidence along with his petition for review to the Indiana Supreme Court or at any other time.

In order to be properly preserved for review by this Court, a federal question must be developed in the courts below in accordance with the manner specified in the

applicable rules of practice in the lower court. *Beck v. Washington*, 369 U.S. 541, 549-54 (1962).

Many of the issues presented for review by the petitioner include intermingled questions of law and fact. "This Court has a duty to examine the evidence to see whether it furnishes a rational basis for the characterization put on it by the lower court." Petition for Writ of Certiorari at 17. The petitioner did not raise his claims in the Indiana Supreme Court in the context of a fully presented record. In the absence of the federal claims having been fully presented on a complete record in the court below, this case is not a proper one for review by this Court on a petition for writ of certiorari. The scarce resources of this Court should not be squandered upon a case that presents little more than a request for review of the factual record below.

IV. The Petition Does Not Raise A Substantial Question That The Underlying Proceeding Deprived The Petitioner Of His Rights To Due Process Of Law

In the underlying proceeding, the petitioner was charged with and found to have violated the Indiana Rules of Professional Conduct governing statements concerning judicial officials and actions that are prejudicial to the administration of justice. Ind.Prof.Cond.R. 8.2(a) and 8.4(d). The Indiana Supreme Court determined that the petitioner violated these rules by making statements concerning certain federal judicial officials with reckless disregard for their truth or falsity in publishing a statement that "described a far-reaching conspiracy involving

judges, bankruptcy trustees, United States Attorneys, and other federal court officials, allegedly devised to illegally convert assets properly belonging to the bankrupt estates." 626 N.E.2d at 811. The court below went on to find that:

> Respondent failed to show that he had actual knowledge of such wrongdoing on the part of the named judicial officials, as evidenced by the content of his open statement. Respondent only had vague and unsubstantiated proclamations of wrongdoing without a single specificity. This Court will not retry the Wade bankruptcy or Respondent's broad allegations of malfeasance therein. Suffice it to say that we are unaware of an iota of reliable evidence supporting Respondent's assertions of judicial misconduct such as to remove them from the realm of mere speculation and conjecture.

Id., at 812.

The petitioner is making one more effort to find a forum to retry his claims that certain assets in the Wade bankruptcy were stolen. He is attempting to turn this Court into such a forum under the guise of a claim that the underlying proceeding violated his due process rights. The case below established that at the time he issued his Open Letter calling into the question the integrity of certain federal judicial officials, he had no factual basis for making those claims. Because the Indiana Supreme Court failed to provide him with a mechanism for attempting the creation of a *post hoc* justification of his reckless claims, the petitioner now claims a violation of his right to be heard.

The person with the most intimate knowledge of the facts known to the petitioner at the time he made the statements in question is the petitioner himself. He can hardly now contend that he has been deprived of his due process rights by being denied the use of the disciplinary proceeding as a vehicle for attempting to prove for the first time the truthfulness of statements that were reckless when made.

The petitioner was not deprived of an opportunity to cross-examine the witnesses who testified against him, nor was he deprived of an opportunity to present evidence in his own defense. He was merely deprived of the use of this lawyer discipline proceeding as a vehicle to fish for facts that he should have had in hand at the time he published his reckless Open Letter. The test under *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976) requires only that an opportunity to be heard be "meaningful." In this case, the issues focused upon the petitioner's state of knowledge of facts relating to the integrity of the federal judicial officials at the time he made his statement. None of the procedural restrictions now questioned by the petitioner in any way affected his ability to show at trial his state of knowledge at the time he made his statement. They only deprived him of the opportunity to attempt the creation of a *post hoc* justification of those statements.

The Indiana Supreme Court noted below that it would not provide the petitioner with a forum for attempting to relitigate issues that should have been presented in the course of the Wade bankruptcy proceeding. Indeed, the petitioner's attempt to use his lawyer discipline proceeding as a forum for relitigating Wade bankruptcy issues is not his first unsuccessful effort to use

collateral actions to constantly relitigate these issues. See *Wade v. Hopper*, 993 F.2d 1246 (7th Cir. 1993), *cert. denied*, 114 S.Ct. 193 (1993) (petitioner was counsel of record for the Wades); *Matter of Wade*, 991 F.2d 402 (7th Cir. 1993), *cert. denied*, 114 S.Ct. 195 (1993) (petitioner was counsel of record for the Wades); *Wade v. Indiana Supreme Court Disciplinary Commission*, *cert. denied*, 113 S.Ct. 468 (1992) (petitioner was counsel of record for the Wades); *Garrinnger v. Daniels and Lundberg*, No. IP-1710-C (S.D.Ind. May 21, 1993), *appeal docketed*, No. 93-3783 (7th Cir. Nov. 23, 1993).

The case below is also not the first occasion upon which the petitioner has resorted to impugning the integrity of judicial officials in connection with legal proceedings relating to the Wade bankruptcy. See *Wade v. Hopper*, No. 91-3892, slip op. at 4-5 (7th Cir. June 17, 1993), *cert. denied*, 114 S.Ct. 313 (1993) (petitioner's name stricken from the roll of attorneys in the Seventh Circuit for having "repeatedly filed briefs full of immaterial, impertinent and scandalous matter, attacked the integrity of members of the court [of appeals], and failed to exercise competent professional judgment.")

Petitioner has not raised a substantial federal question under the Due Process Clause of the Fourteenth Amendment, where his due process claim amounts to nothing more than a complaint that he has been deprived of yet one more forum for litigating claims that were more properly presented and resolved in the original Wade bankruptcy proceeding.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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NO. 93-2094

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1993

IN THE MATTER OF:

DONALD MARK GARRINGER

On Petition for Writ of Certiorari
to the Indiana Supreme Court

REPLY BRIEF

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ADDITIONAL RULE INVOLVED [1]

Rule 23, Section 15(c) of the Indiana Rules of Admission and Discipline:

"In the event a party does not concur in a factual finding made by the hearing officer and asserts error in such finding in the petition for review, such party shall file with the petition for review a record of all the evidence before the hearing officer relating to this factual issue. Within thirty (30) days of the filing of the transcript, opposing parties may file such additional transcript as deemed necessary to resolve the factual issue so raised in the petition for review. Any transcript filed must be settled,signed and certified as true and correct by the hearing officer. The fee paid for procuring a transcript or additional transcript shall be included in the costs of the disciplinary proceeding."

Footnote 1 - The Brief In Opposition cites a portion of this Rule without edtiorial punctuation to indicate editing. Brief In Opposition at 8.

I. THE PETITIONER EXHAUSTED HIS REMEDY TO PRESERVE RECORD ON REVIEW.

The Respondent (hereafter,"Lundberg") asserts in his third reason for denying the petition that the Petitioner (hereafter, "Garringer") failed to preserve record below. Brief in Opposition at 7. The record shows that Garringer promptly ordered transcript, citing Rule 23, Section 15(c) of the Indiana Rules of Admission and Discipline as the authority to do so. Id.

Garringer's ordering of transcript is identical to Garringer's subpoena to Lundberg for information concerning collections of Schedule B-1 accounts of Wade Trucking. B. App 10 and 11-14 of Petition. It is "public record", wherever located, that is in the exclusive custody and control of respondent. In Re: Grand Jury Proceedings and In Re: Jim's Garage, 119 Bankruptcy Reporter 945 (E.D.Mich.-1989), cited at 15 of Petition. Garringer cannot get them to do what they do not want to do. Garringer can only exhaust his remedy and do his best.

II. THE PETITION DOES RAISE A SUBSTANTIAL QUESTION THAT THE UNDERLYING PROCEEDING DEPRIVED THE PETITIONER OF HIS RIGHTS TO DUE PROCESS.

At Reason Four of the Brief in Opposition, Lundberg states: "The petitioner was not deprived of an opportunity to cross-examine the witnesses who testified against him, nor was he deprived of an opportunity to present evidence in his own defense." Brief in Opposition at 10. This appears to be a material fact in dispute. See, Petition at 8-9.

The record is clear that Garringer was not availed the opportunity to cross-examine Lundberg, who testified against him by way of verified complaint. B.App. 11-14 of Petition. The record shows Garringer was not availed the opportunity to cross-examine the counsel for Merchants National Bank, whose letters and telephone calls to the Disciplinary Commission initiated the disciplinary proceeding.

As for witnesses called at hearing, Garringer was availed the opportunity to cross-examine the first witness called by Lundberg to the point where Garringer established that the witness had been the presiding judicial officer in charge of supervision of administration of the Wade bankruptcy from September, 1988, until July, 1989. Garringer asked what happened to the item of property identified as "Cal-Ark" on Schedule B-1. At that point, the Hearing Officer prohibited further cross-examination concerning the Wade bankruptcy since the court would not "retry" the Wade bankruptcy. See, Brief in Opposition at 9, citing the Indiana Supreme Court at 626 N.E.2d at 811, App. 9 of Petition.

Both the Indiana Supreme Court and Lundberg avoid discussing the pertinent fact that the Hearing Officer not only struck paragraph 4 of Lundberg's verified complaint alleging that Garringer "made false statements that he knew to

be false" [See, App. 10-11 of Petition], the Hearing Officer also struck paragraph 2 of the verified complaint alleging that Garringer "made false statements." They avoid this fact to avoid discussion of the procedural deficiencies in this matter. App. 10-11 of Petition.

As for being able to present witnesses and evidence in his own defense, Garringer admits that he was availed the opportunity to call the weatherman and ask about the weather tomorrow. However, not only would the Hearing Officer not "relitigate" the Wade bankruptcy, the complaint was amended to omit the allegation that Garringer made false statements. Thus, the Hearing Officer determined that the truth of Garringer's statements were immaterial and irrelevant, and nothing would be allowed in the record concerning the Wade bankruptcy.

Lundberg does not dispute the central fact demonstrated by the Petition that the State of Indiana is a kleptocracy where lawyers routinely

steal property that is entrusted to their care. Petition at 19-24, and Brief In Opposition, passim. Thus, it is clear why Lundberg does not want to testify in this matter. He may cite local rules concerning the confidentiality of his investigations to withhold information concerning the collections of Schedule B-1 accounts of Wade Trucking. See, B.App. 11-14 of Petition. However, an examination of Lundberg would reveal that this withholding of information is prohibited by the Laws of the United States, as well as local rule. 18 U.S.C. Sec. 152; Rule 1.15 of Indiana Rules of Professional Conduct. In other words, cross-examination is an engine of truth-telling that is an embarassment here. Id.

III. PETITIONER'S FIRST AMENDMENT CLAIMS WERE PROPERLY RAISED BELOW.

Lundberg is technically correct that Garringer did not raise his First Amendment

claims as to "freedom of utterance" below in the form of the first question presented for review in the Petition, and first reason why the Petition should be granted. Brief in Opposition at 3-4; Petition at 13.

However, Garringer has firmly and consistently raised the issue below as to whether there can be a finding of "reckless disregard of the truth" without a finding of falsity, as presented in the third question for review, and third reason why the Petition should be granted. Petition at 17. The crux of the error below was findings that Garringer made statements with "reckless disregard of the truth". App. 11-12 of Petition. Garringer raised the issue of this finding of reckless disregard for the truth, when the truth is ruled irrelevant and inadmissable for evidence. Garringer raised the relevant applicable law creating and defining the term. New York Times -v- Sullivan, 376 U.S. 254, and its progeny; See, Petition at 17. This is the

crux of Garringer's First Amendment claim. Infra. Garringer always firmly and consistently raised that claim. Passim.

Simply because an issue is appropriately elaborated for review by this Court does not mean that it has not been raised below. See, Petition at 13 and 17.

IV. THE PETITIONER RAISES A SUBSTANTIAL FIRST AMENDMENT CLAIM.

The crux of Garringer's First Amendment claim is that the lower court made a finding of reckless disregard of the truth without a finding of falsity. Petition at 17. Lundberg mischaracterizes this claim when he states that Garringer points out no "significant division of authority" whether a lawyer may be properly sanctioned for attacking the integrity of a judicial official with reckless disregard of truth or falsity. Brief In Oppsition at 6. However, Garringer does not dispute this.

Garringer disputes the evidentiary basis for making this finding, contrary to common law and common sense. Garrison -v- Louisiana, 379 U.S. 64 (1964), cited in Petition at 17.

Contrary to the characterization of the lower court that Garringer "admits" violations of attorney conduct rules [App.13-14 of Petition], Garringer has never admitted attorney misconduct. App. 7 of Petition. The ingredients for Garringer to admit that he made statements with disregard of the truth, and that sanctions were proper, are simple. Show Garringer a specific statement that he made with reckless disregard of the truth. Then, articulate a rational basis for believing that the statement was made with reckless disregard of the truth after Garringer identifies the pertinent part of record where that fact appears. There is nothing like that in the record here. Petition at 6.

Key to the understanding of the opinion of

lower court may be found in its characterization of Garringer's statements as "scathing statements." App.12 of Petition. The term "scathing", by common definition and usage, means truthful statements when the truth hurts. Such is the case here. Garringer admits that he made scathing statements.

If there had been an attorney conduct rule that stated that "a lawyer shall not make scathing statements," then Garringer would not have made the statements as he would have notice of a rule forbidding such conduct. However there is no such rule. See, Rule 8.2(a) and 8.4(d) of the Indiana Rules of Professional Conduct, Brief In Opposition at 2. The plain meaning of the rules apply. Pavlic & LeFlore -v- Marvel Comics Group, 493 U.S. 120, 123, 107 L.Ed.2d 438, 110 S.Ct. 456 (1989).

If a rule is promulgated that lawyers shall not make scathing statements, then fifty thousand prosecutors are out of a job. If a rule

is tailored so that "lawyers shall not make scathing statements concerning judicial officers," then this is a rule that has yet to be reduced to a writing. Id.

Garringer is first and foremost required by law to uphold the Constitution of the United States, advise the courts when they depart from the law, report wrongdoing to the authorities, and, "never reject, from any consideration personal to myself, the cause of the defenseless and oppressed." Oath of Attorney, Rule 22 of the Indiana Admission and Discipline Rules. Scathing statements, when warranted, sometimes come with the job. Id.

The Brief in Opposition states that, whether an attorney has acted recklessly is to be measured by "what the reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances" citing In Re: Graham, 453 N.W.2d 313 (Minn.- 1990). Brief In Opposition at 6.

If by this, Lundberg means that most lawyers would evaluate the prospect of prevailing, the prospect of getting paid for services rendered, and the prudent course of conduct to advance his career in the profession of law, then we have an understanding of what Lundberg means by "an objective standard" of measuring a lawyer's conduct. Brief In Opposition at 6. However, this is contrary to the plain meaning of the rules. Oath of Attorney, Rule 22 of Indiana Rules of Admission and Discipline, supra.

Conclusion

The Brief In Opposition conclusively demonstrates far departures from the law as the Petition predicted that it would. Petition at 25. Statements made in the Petition may be characterized as "scathing." The Petition conclusively demonstrates that the State of Indiana is a kleptocracy where lawyers routinely steal property entrusted to their care. Petition at 19. In this, Garringer is like the child who

pleaded with "Shoeless Joe" Jackson to "say it ain't so." Tragically, Lundberg cannot say it "ain't so", because it is so, and so proved by pertinent parts of record where that fact appears. This Reply demonstrates that alleged procedural deficiencies articulated in the Brief in Opposition are mere puff and smoke, and not well-taken.

Respectfully Submitted

Donald Mark Garringer